IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CATHERINE SUSAN METZGER,	:	**CIVIL ACTION**
Plaintiff.	:	
	:	
v.	:	
	:	
NATIONAL COMMISSION ON CERTIFICATION OF PHYSICIAN ASSISTANTS,	:	
Defendant.	:	**NO. 00-4823**

ORDER & MEMORANDUM

ORDER

AND NOW, this 25th day of January, 2001, upon consideration of pro se Plaintiff's Petition for Judicial Review of the Validity of Recertification Exams for Physician Assistants and Court Order for an Injunction to Prevent Removal of Plaintiff's Certification and defendant's Notice of Removal Pursuant to 28 U.S.C. Section 1441 et seq. (Document No. 1, filed September 22, 2000),[1] Motion of National Commission on Certification of Physician Assistants, Inc. to Dismiss Plaintiff's Petition Pursuant to F.R.C.P. 12(b)(6) (Document No. 3, filed September 29, 2000), Plaintiff's Response to the Motion of National Commission of Physician Assistants, Inc. to Dismiss Plaintiff's Petition Pursuant to F.R.C.P. 12(b)(6) (Document No. 4, filed October 10, 2000), and Reply of National Commission on Certification of Physician Assistants, Inc. to Plaintiff's Response to the Motion to Dismiss Plaintiff's Petition Pursuant to F.R.C.P. 12(b)(6)

[1] For the purposes of this Order and Memorandum, the Court will treat pro se plaintiff's Petition for Judicial Review as a complaint.

(Document No. 5, filed October 23, 2000), **IT IS ORDERED** that the Motion of National Commission on Certification of Physician Assistants, Inc. to Dismiss Plaintiff's Petition Pursuant to F.R.C.P. 12(b)(6) is **GRANTED** and the action is **DISMISSED WITH PREJUDICE**.

MEMORANDUM

I. INTRODUCTION

This case arises out of defendant's refusal to renew plaintiff's certification as a physician assistant. Plaintiff Catherine Susan Metzger ("Metzger" or plaintiff) states in her complaint that she worked as a certified physician assistant ("PA") from 1973 to 1999. She alleges that, on or about March 1999, defendant National Commission on Certification of Physician Assistants ("NCCPA") notified her that she would be required to take a recertification examination in order to remain certified. She took the recertification examination in 1999 and 2000, and did not achieve a passing score. On or about May 2000, the NCCPA notified Metzger that her certification would expire on June 1, 2000 but that she could attempt to regain certification by taking examinations offered in the fall of 2000 or in 2001.

Plaintiff alleges in the complaint that she has been denied due process and discriminated against on the basis of age by the NCCPA and that the examination is not a fair, objective or reasonable test to judge the competency of a physician assistant. Plaintiff also avers that the NCCPA's actions were arbitrary and capricious and an abuse of discretion. As a result of such conduct, she claims she has suffered emotional distress, depression, deprivation of livelihood, financial loss, and extreme pain and suffering. Based on the following analysis, the Court concludes that plaintiff has failed to state a claim upon which relief may be granted.

II. STANDARD OF REVIEW

Rule 12(b)(6) of the federal rules of civil procedure provides that a defense of "failure to state a claim upon which relief can be granted" may be raised by motion in response to a pleading. Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S. Ct. 1843, 1849, 23 L. Ed. 2d 404 (1969). The court must only consider those facts alleged in the complaint in considering such a motion. See ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984).

Plaintiff is proceeding pro se in this case. The Court is mindful of the instruction that it should broadly construe normal pleading requirements when handling pro se submissions. See Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d (1972) (holding pro se complaint "to less stringent standards than formal pleadings drafted by lawyers"). Accordingly, the Court will treat Plaintiff's Petition for Judicial Review as a complaint.

III. ANALYSIS

A. Due Process Claim

To state a claim for a deprivation of due process in violation of the Fourteenth Amendment, plaintiff must allege that a state actor caused a deprivation of a right, liberty or property without due process of law. The Court first turns to the state action requirement.

1. State Action Requirement

In her complaint, plaintiff avers that she has been denied due process, a claim which the Court will analyze as brought pursuant to 42 U.S.C. § 1983, claiming a violation of the Due Process Clause of the Fourteenth Amendment. Complaint ¶ 6. In order to succeed on this constitutional claim, plaintiff must first show that defendant is a state actor, or that defendant acted under color of state law. As explained recently by the United States Supreme Court, "the Fourteenth Amendment, by its very terms, prohibits only state action. . . . 'That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.'" United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 1756, 146 L. Ed. 2d 658 (2000) (quoting Shelley v. Kraemer, 334 U.S. 1, 13 and n.12, 68 S. Ct. 836, 92 L. Ed. 1161 (1948)).

State action may be shown where (1) "the deprivation [was] caused by the exercise of some right or privilege created by the State or by rule of conduct imposed by the State or by a person for whom the State is responsible" and (2) "the party charged with the deprivation [was] a person who may fairly be said to be a state actor." Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937, 102 S. Ct. 2744, 2754, 73 L. Ed. 2d 482 (1982). In cases where the defendant is a private party, as in this case, it is the second prong of the Lugar test which is implicated. See id.

at 937–39, 102 S. Ct. at 2754–55; see also Goussis v. Kimball, 813 F. Supp. 352, 356 (E.D. Pa. 1993).

The central question in this case is thus whether the private party that allegedly caused the deprivation may fairly be said to be a state actor. To make this determination, the Supreme Court has set forth a number of different tests. They include, inter alia, the (1) "public function" test, whereby private actors are deemed to be engaged in state action if they perform functions traditionally relegated to the State; (see Terry v. Adams, 345 U.S. 461, 468–70, 73 S. Ct. 809, 97 L. Ed. 1152 (1953)); (2) the "close nexus" test, which determines whether the state itself may be deemed responsible for the injury of which the plaintiff complains (see Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1977)); and (3) the "symbiotic relationship" test, under which a court will examine the overall relationship between the parties to determine whether the state has "insinuated itself into a position of interdependence with [the acting party]" such that the state may be recognized as a joint participant in the challenged activity. See Burton v. Wilmington Parking Auth., 365 U.S. 715, 725, 81 S. Ct. 856, 862, 6 L. Ed. 2d 45 (1961). Which test to apply in a given case depends on circumstances, and "the Supreme Court has counseled lower courts to investigate carefully the facts of each case." Goussis v. Kimball, 813 F. Supp. 352, 357 (E.D. Pa. 1993) (citing Burton v. Wilmington Parking Auth., 365 U.S. at 722, 81 S. Ct. at 860).

Given the facts of this case as alleged in the complaint and an examination of the Pennsylvania licensing requirements for physician assistants, the Court concludes that the NCCPA is not a state actor as contemplated by any of the above tests. First, the Court notes that the Commonwealth of Pennsylvania, not the NCCPA, has imposed certification and biennial

renewal requirements on all physician assistants in Pennsylvania. The NCCPA merely provides a mechanism by which a candidate may meet the state requirements.[2]

The Pennsylvania legislature, by statute, has set forth specific requirements regarding the qualification and certification of physician assistants, as follows:

> (b) Requirements.—No physician assistant certificate may be issued to the applicant unless the requirements set forth by this act and such rules and regulations issued by the [state] board are met, including requirements for the physician assistant certificate of training and educational programs which shall be formulated by the [state] board in accordance with such national criteria as are established by national organizations or societies as the [state] board may accept.
>
> (c) Criteria.—The [state] board shall grant physician assistant certificates to applicants who have fulfilled the following criteria:
> (1) Satisfactory performance on the proficiency examination to the extent that a proficiency examination exists.
> (2) Satisfactory completion of a certified program for the training and education of physician assistants.
>
> (d) Biennial renewal.—A physician assistant certificate shall be subject to biennial renewal by the [state] board.

63 Pa. C.S.A. § 422.36. Pursuant to state regulations, "[t]o be eligible for renewal of physician assistant certification, the physician assistant shall maintain his National certification by completing current recertification mechanisms available to the profession and recognized by the board." 49 Pa. Code § 18.145(c).

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[2] The procedure for licensing and certification of physician assistants varies from state to state. As discussed by the court in Gilliam National Comm'n for Certification of Physician Assistants, Inc., 727 F. Supp. 1512, 1513 (E.D. Pa. 1989), "[t]he need for a[n] NCCPA certificate in order to engage in the profession of physician assistant varies greatly from jurisdiction to jurisdiction. . . . In . . . New York and Delaware, a person who has once been issued an NCCPA certificate can thereafter work as a physician assistant without re-registration or renewal. In still other jurisdictions, a[n] NCCPA certificate is not required for persons who have graduated from accredited educational programs."

The Pennsylvania statutory framework requires any applicant for physician assistant renewal in Pennsylvania to maintain his or her national certification. This requirement does not warrant a finding that the NCCPA is a state actor or that it was acting under color of state law in this case. As explained by the court in Gilliam, "although its [NCCPA's] certifications are relied upon by many states in their licensing decisions, NCCPA is a private organization. It receives no financial support from any government, and it operates in all respects on a completely independent basis." Gilliam v. National Comm'n for Certification of Physician Assistants, Inc., 727 F. Supp. 1512, 1514 (E.D. Pa. 1989). See also Sammons v. National Comm'n on Certification Physician Assistants, Inc., 104 F. Supp. 2d 1379, 1381–82 (N.D. Ga. 2000) (concluding that the NCCPA did not engage in state action by reporting test results); Zamani v. American Dental Assoc., 1998 WL 812545, at *5–6 (N.D. Ill. Nov. 18, 1998) (rejecting claim of discrimination brought against American Dental Association and Join Commission on National Dental Examinations for lack of state action); Goussis v. Kimball, 813 F. Supp. 352, 356–58 (E.D. Pa. 1993) (holding that the American Board of Internal Medicine does not engage in state action by reporting certification test results).[3]

Plaintiff has not alleged, and the Court does not conclude based on the applicable statute and regulations, that the NCCPA engaged in state action under any of the tests set forth supra. First, the NCCPA's actions were not among those traditionally deemed the exclusive prerogative of the state under the "public function" test—testing and test score reporting are not actions

[3] Courts have reached similar conclusions with respect to private organizations that engage in academic testing and score reporting. See Langston v. ACT, 890 F.2d 380 (11th Cir. 1989) (concluding that the American College Testing Program does not engage in state action by administering tests and reporting test scores); Johnson v. Educational Testing Service, 754 F.2d 20, 23–25 (1st Cir. 1985) (same).

deemed traditionally relegated to the state. Second, Pennsylvania itself may not be deemed responsible for the actions of the NCCPA under the "close nexus" test as the state has no authority or control over the NCCPA. Finally, the Court concludes that the NCCPA and the Commonwealth of Pennsylvania are not interdependent—the NCCPA cannot be found to be a state actor under the "symbiotic relationship" test by virtue of the fact that the Commonwealth of Pennsylvania has decided to rely on NCCPA test results. As such, the alleged deprivation in this case was not caused by a person who "may fairly be said to be a state actor." Lugar, 457 U.S. at 937, 102 S. Ct. at 2754.

The Court thus holds that the NCCPA cannot be held liable under the Fourteenth Amendment Due Process Clause as it is not a state actor and did not act under color of state law. Notwithstanding this determination, the Court will address the second element of a Fourteenth Amendment Due Process Clause claim.

2. Deprivation of Property

To bring a claim such as this one under the Fourteenth Amendment, in addition to state action, plaintiff must allege a deprivation of a property right. U.S. Const. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."). The only possible property right at issue is plaintiff's interest in her physician assistant license. However, as set forth in Gilliam, 727 F. Supp. at 1514, "[Plaintiff, a formerly certified physician assistant,] has no vested right to certification, no property entitlement to renewal of his certification or of his license which could form the basis of a claim for violation of due process . . . ." This Court agrees with the court's analysis in Gilliam and concludes that plaintiff does not have a property right in her PA license such that she is entitled to procedural due

process protection. For that additional reason, the Court holds that plaintiff has failed to state a Fourteenth Amendment due process claim against defendant NCCPA upon which relief can be granted.

B. Discrimination on the Basis of Age

Plaintiff also asserts that she has been discriminated against on the basis of age,[4] but she has not alleged any specific legal basis for that claim. Analyzing plaintiff's claim first as a constitutional claim under the Equal Protection Clause of the Fourteenth Amendment, the Court concludes that there is no state action on which to base such a claim. As an alternative to a constitutional claim, the Court will analyze plaintiff's claim under the Age Discrimination in Employment Act ("ADEA") and the Pennsylvania Human Relations Act. For the reasons stated below, the Court concludes that neither statute nor any other federal or state statute provides a remedy for the age discrimination alleged in this case.

The Age Discrimination in Employment Act ("ADEA"), 81 Stat. 602, as amended 29 U.S.C.A. § 621 et seq. (West 1999 & Supp. 2000), makes it unlawful for an employer to, inter alia, (1) fail or refuse to hire or otherwise discriminate against any individual on the basis of age; and (2) limit, segregate, or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or adversely affect his status as an employee because of the individual's age. 29 U.S.C.A. § 623 (West 1999 & Supp. 2000). The NCCPA is not

[4] Specifically, plaintiff asserts that defendant's motive in requiring all physician assistants to pass a recertification examination was "for political and monetary means in order to limit the amount of Physician Assistants who are older in the field to prevent them from practicing medicine." Complaint ¶ 2; see also id. at ¶ 6 (alleging that she was "discriminated against by the [NCCPA] because she is an older Physician Assistant").

plaintiff's employer within the meaning of the ADEA;[5] rather, the NCCPA independently sets certification standards for physician assistants. The Court thus concludes that plaintiff has not stated a claim under the ADEA upon which relief can be granted.

The Court reaches the same conclusion with respect to the Pennsylvania Human Relations Act. 43 Pa. C.S.A. § 951 et seq. (Purdon's 1991 & Supp. 2000). This statute provides the exclusive remedy for discrimination in employment on the basis of age under Pennsylvania state law. See Watkinson v. Great Atlantic & Pacific Tea Co., Inc., 585 F. Supp. 879, 882 (E.D. Pa. 1984). The Pennsylvania Human Relations Act, however, is not applicable to the type of discrimination alleged in this case as plaintiff and the NCCPA are not in an employment relationship. See 43 Pa. C.S.A. §§ 954 & 955 (Purdon's Supp. 2000).

C. Infliction of Emotional Distress

Plaintiff also alleges that she has suffered emotional distress. Complaint ¶ 8. Although not set forth in the complaint as a separate claim, the Court will treat such allegations as a claim of intentional infliction of emotional distress. Under Pennsylvania law, the tort of intentional infliction of emotional distress is defined as follows: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Hoy v. Angelone, 554 Pa. 134, 150–51, 720 A.2d 745, 753 (1998) (quoting Restatement (Second) of Torts, § 46(1) (1965)). To succeed on such a claim, plaintiff must

[5] As defined in 29 U.S.C.A. § 630(b) (West 1999), "[t]he term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . The term also means (1) any such agent of such person . . . ."

allege facts sufficient to establish that '"[t]he conduct [was] so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.'" Id. at 151, 720 A.2d 745 (quoting Buczek v. First National Bank of Mifflintown, 366 Pa. Super. 551, 558, 531 A.2d 1122, 1125 (1987)).

Defendant's alleged conduct can not be considered outrageous as a matter of law. To the contrary, the facts alleged (as opposed to plaintiff's conclusions) disclose that defendant at all times acted in a fair and appropriate manner with respect to the issue of recertification of physician assistants. The Court thus concludes that plaintiff has not alleged facts sufficient to make out a prima facie case of intentional infliction of emotional distress.

D. Interference with Contract

Plaintiff's claim may also be characterized as one for interference of her right to enter into contracts; specifically, that the NCCPA interfered with her ability to contract freely to work as a physician assistant by denying her a passing score on the recertification examination. Although federal law does protect discriminatory interference with the right to make and enforce contracts, this protection does not extend to claims of discrimination on the basis of age. See 42 U.S.C.A. § 1981 (West 1994) ("All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . to the full and equal benefit . . . as is enjoyed by white citizens . . . ."); Boddorff v. Publicker Industries, Inc., 488 F. Supp. 1107, 1109–10 (E.D. Pa. 1980) ("To hold that § 1981 embraces claims of age discrimination would contradict not only decisions of virtually every circuit court of appeals, but also the district courts in every circuit, districts within this circuit, and the judges within this district." (footnotes and

citations omitted)). Having concluded that plaintiff does not allege facts sufficient to state a claim for interference with her freedom to contract, the Court now turns to plaintiff's remaining allegations.

E. Plaintiff's Other Allegations

Plaintiff also alleges that (1) the certification examination is not a "fair, objective, and reasonable test to judge the competency of a Physician Assistant who has completed and successfully passed all required exams for licensure in the past and has been practicing for 20 years" (Complaint ¶ 7); and (2) the defendant's actions were arbitrary and capricious and an abuse of discretion (Complaint ¶ 9). These allegations do not state claims upon which relief can be granted.

Federal Rule of Civil Procedure 8 provides generous pleading standards. Fed. R. Civ. P. 8. However, plaintiff's claims that the NCCPA examination was not fair and objective and that its actions were arbitrary and capricious[6] do not set forth claims for relief. See, e.g., Staudinger v. Educational Comm'n for Foreign Medical Graduates, 1993 WL 138954, at *7 (S.D.N.Y. Apr. 28, 1993) (dismissing for failure to state a claim plaintiff's allegation that the Educational Commission for Foreign Medical Graduates has an "unreasonable, arbitrary, capricious, [and] malicious" certification policy). Plaintiff's generalized claim that the NCCPA exam is unfair is similar to the generalized claim of unfairness dismissed by the Staudinger court; plaintiff's claims shall likewise be dismissed for failure to state a claim upon which relief can be granted.

[6] Plaintiff's claim that the NCCPA's actions were arbitrary and capricious may be grounded in the Administrative Procedure Act, 5 U.S.C.A. § 701, et seq. (West 1996 & Supp. 2000). As the NCCPA is a private organization, not a governmental agency, the regulations governing federal agencies are inapplicable. See 5 U.S.C.A. § 551(1) (West 1996) ("'[A]gency' means each authority of the Government of the United States . . . .").

IV. CONCLUSION

For the foregoing reasons, the Motion of National Commission on Certification of Physician Assistants, Inc. to Dismiss Plaintiff's Petition Pursuant to F.R.C.P. 12(b)(6) is granted. In view of the grounds for this decision, plaintiff will not be given leave to file an amended complaint.

BY THE COURT:

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JAN E. DUBOIS, J.